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fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken and the reasons for which such actions were taken, including a description of the views expressed on any item and a record reflecting the vote of each Commissioner. All documents considered in connection with any action shall be identified in the minutes.

(c) The transcript, electronic recording, or copy of the minutes of a meeting shall disclose the identity of each speaker.

(d) The Commission shall maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete copy of the minutes of the proceedings of each meeting for at least two years, or for one year after the conclusion of any Commission proceeding with respect to which the meeting was held, whichever occurs later.

### § 9407.8 Public availability of records.

The Commission shall make available to the public the transcript, electronic recording, or minutes of a meeting, except for items of discussion or testimony that relate to matters the Commission has determined to contain information that may be withheld under § 9407.5(a). This information shall be made available as soon as practicable after each meeting on the Commission's Web site. Otherwise, requests to receive or review transcripts, electronic recordings, or minutes of a meeting should be addressed to the Communications Director, U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005. Copies of a transcript, a transcription of the electronic recording, or the minutes of a meeting (except for items of discussion or testimony that relate to matters withheld under § 9407.5) shall be furnished at cost to any person upon written request pursuant to the requirements of 11 CFR part 9405.

[73 FR 54257, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

## 11 CFR Ch. II (1–1–14 Edition)

### PART 9409—TESTIMONY BY COMMISSION EMPLOYEES RELATING TO OFFICIAL INFORMATION AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

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AUTHORITY: 44 U.S.C. 3102.

SOURCE: 73 FR 54271, Sept. 18, 2008, unless otherwise noted.

#### § 9409.1 Purpose and scope.

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the United States Election Assistance Commission to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The Commission intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving the Commission in controversial issues not related to its functions;

(3) Maintain the Commission's impartiality among private litigants where the Commission is not a named party; and

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(4) Protect sensitive, confidential information and the deliberative processes of the Commission.

(c) In providing for these requirements, the Commission does not waive the sovereign immunity of the United States.

(d) This part is intended only to provide guidance for the internal operations of the Commission and to inform the public about Commission procedures concerning the service of process and responses to demands or requests. The procedures specified in this part, or the failure of any Commission employee to follow the procedures specified in this part, are not intended to create, do not create, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable at law by a party against the United States.

### § 9409.2 Applicability.

(a) This part applies to demands and requests to employees for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which the Commission is not a named party. However, it does not apply to:

(1) Demands upon or requests for a Commission employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the Commission;

(2) Demands upon or requests for a former Commission employee to testify as to matters in which the former employee was not directly or materially involved while at the Commission;

(3) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(4) Congressional demands and requests for testimony or records.

(b) [Reserved]

### § 9409.3 Definitions.

As used in this part, the term—

*Commission* means the U.S. Election Assistance Commission, established by the Help America Vote Act of 2002, 42 U.S.C. 15301 *et seq.*

*Commission employee or employee* means:

(a) Any current or former officer or employee of the Commission;

(b) Any other individual hired through contractual agreement by or on behalf of the Commission or who has performed or is performing services under an agreement for the Commission; and

(c) Any individual who served or is serving in any consulting or advisory capacity to the Commission, whether formal or informal.

(d) This definition does not include persons who are no longer employed by the Commission and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Commission.

*Demand* means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a Commission employee that is issued in a legal proceeding.

*General Counsel* means the General Counsel of the Commission or a person to whom the General Counsel has delegated authority under this part.

*Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

*Records or official records and information* means:

(a) All documents and materials that are Commission records under the Freedom of Information Act (5 U.S.C. 552);

(b) All other documents and materials contained in files of the Commission; and

(c) All other information or materials acquired by a Commission employee in the performance of his or her official duties or because of his or her official status.

*Request* means any informal request, by whatever method, for the production of records and information or for

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testimony that has not been ordered by a court or other competent authority.

*Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

#### **§ 9409.4 Production or disclosure prohibited unless approved by appropriate Commission official.**

(a) No employee or former employee of the Commission shall, in response to a demand of a court or other authority, produce a record or disclose any information relating to any record of the Commission, or disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the prior, written approval of the General Counsel of the Commission.

(b) Any expert or opinion testimony by a former employee of the Commission shall be excepted from the requirements of this part where the testimony involves only general expertise gained while employed at the Commission.

#### **§ 9409.5 Procedures for demand for testimony or production of documents.**

(a) A demand directed to the Commission for the testimony of a Commission employee or for the production of documents shall be served in accordance with the Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or applicable State procedures and shall be directed to the General Counsel, U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005. Acceptance of a demand shall not constitute an admission or waiver with respect to jurisdiction, propriety of service, improper venue, or any other defense in law or equity available under the applicable laws or rules.

(b) If a subpoena is served on the Commission or a Commission employee before submitting a written request and receiving a final determination, the Commission will oppose the subpoena on grounds that the request was not submitted in accordance with this part.

(c) A written request must contain the following information:

(1) The caption of the legal proceeding, docket number, name and address of the court or other authority involved; and the procedural posture of the legal proceeding.

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on the Commission to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a Commission employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case;

(9) An estimate of the amount of time that the requester and other parties will require of each Commission employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding; and

(10) Whether travel by the Commission employee is required to provide the testimony; or, in lieu of in-person testimony, whether a deposition may be taken at the employee's duty station.

(d) The Commission reserves the right to require additional information to complete a request where appropriate.

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(e) A request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(f) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with a request.

(g) Notification to the General Counsel:

(1) Employees shall immediately refer all inquiries and demands made on the Commission to the General Counsel.

(2) An employee who receives a subpoena shall immediately forward the subpoena to the General Counsel. The General Counsel will determine the manner in which to respond to the subpoena.

[73 FR 54271, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

### § 9409.6 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

[73 FR 54271, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

### § 9409.7 Factors to be considered by the General Counsel.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) The Commission has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder the Commission in performing its statutory duties or use Commission resources where responding to the demand or request will interfere with the ability of Commission employees to do their work;

(e) Allowing such testimony or production of records would be in the best interest of the Commission or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, Executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, otherwise protected information, or information which would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings, or compromise constitutional rights;

(k) Disclosure would result in the Commission appearing to favor one litigant over another;

(l) Disclosure relates to documents that were produced by another agency;

(m) A substantial Government interest is implicated;

(n) The demand or request is within the authority of the party making it; and

(o) The demand or request is sufficiently specific to be answered.

### § 9409.8 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this part, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Commission will process requests in the order in which they are

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received. Absent exigent or unusual circumstances, the Commission will respond within 45 days from the date a request is received. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this part where a waiver is considered necessary to promote a significant interest of the Commission or the United States or for other good cause.

### **§ 9409.9 Final determination.**

The General Counsel will make the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a Commission employee.

### **§ 9409.10 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on the testimony of Commission employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The Commission may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify under this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose confidential or privileged information; or

(2) For a current Commission employee, testify as an expert or opinion

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witness with regard to any matter arising out of the employee's official duties or the functions of the Commission unless testimony is being given on behalf of the United States.

### **§ 9409.11 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, the Commission may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original Commission records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official Commission records, nor are they to be marked or altered. In lieu of the original records, certified copies will be presented for evidentiary purposes (see 28 U.S.C. 1733).

### **§ 9409.12 Procedure when a decision is not made prior to the time a response is required.**

If a response to a demand or request is required before the General Counsel's decision is received, a U.S. attorney or a Commission attorney designated for the purpose shall appear with the employee or former employee of the Commission upon whom the demand has been made and shall furnish the court or other authority with a copy of the regulations contained in this part and inform the court or other authority that the demand has been, or is being, as the case may be, referred for the prompt consideration of the appropriate Commission official and shall

respectfully request the court or authority to stay the demand pending receipt of the requested instructions.

**§ 9409.13 Procedures when the General Counsel directs an employee not to testify or provide documents.**

(a) If the General Counsel determines that an employee or former employee should not comply with a subpoena or other request for testimony or the production of documents, the General Counsel will so inform the employee and the party who submitted the subpoena or made the request.

(b) If, despite the determination of the General Counsel that testimony should not be given and/or documents not be produced, a court of competent jurisdiction or other appropriate authority orders the employee or former employee to testify and/or produce documents; the employee shall notify the General Counsel of such order.

(1) If the General Counsel determines that no further legal review of, or challenge to, the order will be sought, the employee or former employee shall comply with the order.

(2) If the General Counsel determines to challenge the order, or that further legal review is necessary, the employee or former employee should not comply with the order. Where necessary, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of this part and respectfully inform the legal tribunal that he/she has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the subpoena must be complied with, the employee shall respectfully decline to comply, citing this section and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

**§ 9409.14 Fees.**

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to the Commission.

(b) *Fees for records.* Requesters will reimburse the Commission for the actual costs of time and resources spent

searching, reviewing and duplicating records. Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. The Commission will charge fees at the salary rate(s) (basic pay plus 16 percent) of employee time spent searching, reviewing, and duplicating records. Fees for duplication will be the same as those charged by the Commission for records disclosed under the Freedom of Information Act (11 CFR 9405), except that the Commission will charge for the actual costs for each page of duplication and will not provide the first 100 pages for free.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. The fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Payment of fees.* Witness fees shall be paid for current Commission employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former Commission employees, applicable fees shall be paid directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records.* The Commission may certify that records are true copies to facilitate their use as evidence. To obtain certification a request for certified copies shall be made to the Commission at least 45 days before the date the copies will be needed. The request should be sent to the General Counsel, U.S. Election Assistance Commission, 1201 New York Avenue, NW., Suite 300, Washington, DC 20005.

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(f) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

[73 FR 54271, Sept. 18, 2008, as amended at 75 FR 49814, Aug. 16, 2010]

## § 9409.15 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by the Commission or as ordered by a Federal court after the Commission has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Former Commission employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current Commission employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action in addition to any penalties assessed under paragraph (a) of this section.

## PART 9410—IMPLEMENTATION OF THE PRIVACY ACT OF 1974

Sec.

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9410.10 Fees.

9410.11 Penalties.

AUTHORITY: 5 U.S.C. 552a.

SOURCE: 73 FR 54257, Sept. 18, 2008, unless otherwise noted.

### § 9410.1 Purpose and scope.

(a) This part sets forth rules that inform the public as to what information

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is maintained by the U.S. Election Assistance Commission about identifiable individuals and that inform those identifiable individuals how they may gain access to and correct or amend information about them.

(b) The regulations in this part carry out the requirements of the Privacy Act of 1974 (Pub. L. 93–579) and in particular 5 U.S.C. 552a as added by that Act.

(c) The regulations in this part apply only to records disclosed or requested under the Privacy Act of 1974 and not to requests for information made under 5 U.S.C. 552, the Freedom of Information Act, or requests for reports and statements filed with the Election Assistance Commission which are public records and available for inspection and copying.

### § 9410.2 Definitions.

As used in this part, the term—

*Commission* means the U.S. Election Assistance Commission, established by the Help America Vote Act of 2002, 42 U.S.C. 15301 *et seq.*

*Commissioner* means an individual appointed to the Commission by the President and confirmed by the Senate under section 203 of the Help America Vote Act of 2002, 42 U.S.C. 15323.

*Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence.

*Maintain* includes maintain, collect, use, or disseminate.

*Record* means any item, collection, or grouping of information about an individual that is maintained by the Commission including, but not limited to, his or her education, financial transactions, medical history, and criminal or employment history and that contains his or her name or the identifying number, symbol, or other identifying information particularly assigned to the individual, such as finger or voice print or a photograph.

*Systems of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying information particularly assigned to the individual.